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Supreme Court, U.S.
FILED

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NO. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

WALTER A. CONNOR, JR.,
Petitioner,

vs.

WESTERN PENNSYLVANIA TEAMSTERS
AND EMPLOYERS PENSION FUND,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Walter A. Connor, Jr.
Respondent In Pro Per
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WALTER A. CONNOR, JR., Plaintiff,	)	Civil Action No. 93-1463
vs.	)	
WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYEES PENSION FUND, Defendant.	)	

REPORT AND RECOMMENDATION

I. Recommendation:

It is respectfully recommended that the plaintiff's motion for summary judgment (Docket No. 6) be denied, that the defendant's cross-motion for summary judgment (Docket No. 17) be granted, and that the plaintiff's motion for temporary restraining order (Docket No. 15) and preliminary injunction (Docket No. 16) be denied as moot.

II. Report:

Presently before the Court for disposition are cross-motions for summary

judgment brought by the plaintiff, Walter A. Connor, Jr. and the defendant, Western Pennsylvania Teamsters and Employees Pension Fund ("the Pension Fund"), as well as motions for a temporary restraining order and preliminary injunction submitted by the plaintiff.[1]

The plaintiff, proceeding pro se, commenced this action in the Court of Common Pleas of Allegheny County, Pennsylvania, alleging that the Pension Fund has unlawfully paid his monthly pension benefit to the Internal Revenue Service ("IRS"), after it received a Notice of Levy from the IRS directing it to forward the plaintiff's monthly pension benefit to it. The defendant filed a timely notice of removal to this Court, and it is not disputed that the Court has original jurisdiction of this matter pursuant to 28 U.S.C. § 1331.

The record shows that the Pension Fund is a jointly trusteed multiemployer pension fund administered by the trustees and operated pursuant to the provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. ("ERISA")[2]; that the Pension Fund is administered for the purpose of providing retirement benefits for eligible participants[3]; that the plaintiff was an active participant in the Pension Fund for 28 years, and having retired, receives a monthly retirement benefit of $865.03 from the Pension Fund[4]; that on March 3, 1993, the Pension Fund received from the IRS a "Notice of Levy On Wages, Salary And Other Income", stating that the plaintiff owed the IRS the amount of $119,739.11[5]; and that said Notice of Levy required the Pension Fund to pay the plaintiff's monthly pension benefit

directly to the IRS effective with the payment commencing on April 1, 1993.[6]

The plaintiff contends that on or about March 10, 1993, he received a letter from the Pension Fund's counsel informing him that (pursuant to the Notice of Levy) the Pension Fund had decided to pay his monthly benefit of $865.03 directly to the IRS. The plaintiff then wrote letters to the Pension Fund's counsel and appeared before the Pension Fund's panel of Trustees expressing his belief that a bona fide court order was needed before his monthly pension benefits could be paid directly to the IRS. When the Pension Fund proceeded to pay his monthly benefits to the IRS absent a court order approving said payments, the plaintiff brought this action. He contends that as of August, 1993, the Pension Fund has unlawfully diverted a

total of $4,325.15 of his pension benefit to the IRS.

In his motion for summary judgment, the plaintiff does not dispute that he owed the IRS the amount of $119,739.11. Rather, he argues that the Notice of Levy was improper; that it was not accompanied by a notice of distraint or a notice of lien as required by provisions of the IRS; and that in complying with said Notice of Levy, the Pension Fund failed to follow the levy and seizure procedures of the Internal Revenue Code, such that it has unlawfully converted his property and denied him due process.

In its cross-motion for summary judgment, the Pension Fund argues that its Board of Trustees acted reasonably and in compliance with the provisions of the Internal Revenue Code in complying with

the Notice of Levy. In support of its position, the Pension Fund has submitted the affidavit of Raymond A. Huber, the Chairman Trustee of its Board of Trustees, who avers that from time to time the Pension Fund is served with a Notice of Levy from the IRS requiring it to pay a retiree's monthly pension benefit to the IRS until the assessment stated in the Notice is satisfied[7]; that in each instance, the Board of Trustees complies with the Notice of Levy and pays the affected retiree's monthly benefit (with exemptions deducted if appropriate), to the IRS[8]; and that in this case, the Board of Trustees considered the Notice of Levy and the IRS instructions that no exemptions be withheld[9], and it adhered to the Board of Trustees Report and Recommendation which denied the plaintiff's appeal before it complied with

the Notice of Levy[10]. The Pension Fund avers that its Board of Trustees considered and handled the instant Notice of Levy in the same manner as Notices previously served upon the Pension Fund for other retirees.[11]

In Resolution Trust Corporation v. Gill, 960 F.2d 336, 340 (3d Cir. 1992), the Third Circuit explained as follows:

> Where the taxpayer's property is held by another, the Government customarily serves a notice of levy upon the custodian. The notice of levy gives the IRS the right to all property levied upon and creates a custodial relationship between the third party and the IRS so that the Government gains constructive possession of the property [citing, United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985)].

A Levy is effective upon the IRS' service of the notice of levy. Id., citing, 26 C.F.R. § 301.6331-1(a) (1991).[12]

The tax levy procedure which permits the IRS to levy on property does

not violate due process. Christensen v. U.S., 733 F.Supp. 844, 853-54 (D.N.J. 1990), aff'd., 925 F.2d 416 (3d Cir. 1991). Further, the IRS may levy under § 6331 of the Internal Revenue Code without a judgment in a court of competent jurisdiction. Id. at 850. Thus, the Pension Fund was not required to obtain a court order before complying with the instant Notice of Levy, and there is no evidence which shows that said Notice was improper.

Section 6332(a) of the Internal Revenue Code, 26 U.S.C. § 6332(a), provides in relevant part:

> [A]ny person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary...

Pursuant to said mandate, the Pension Fund was required to surrender the plaintiff's monthly benefits to the IRS upon receiving the Notice of Levy.

Had the Pension Fund not complied with the IRS' Notice of Levy, it would have incurred personal liability pursuant to section 6332(d) of the Internal Revenue Code, 26 U.S.C. § 6332(d). In relevant part, § 6332(d)(1) provides:

> Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made...

It is also provided in section 6332(d)(2) that:

> In addition to the personal liability imposed by paragraph (1), if any person required to surrender property

> or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1).... 26 U.S.C. § 6332(d)(2).

Thus, the plaintiff's argument that the Pension Fund unlawfully converted his property is without merit.

Finally, it is clear that the Pension Fund is exempt from liability as to the plaintiff for complying with the Notice of Levy. Section 6332(e) of the Internal Revenue Code, 26 U.S.C. § 6332(e) provides in pertinent part:

> Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary ... shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

Also see, Carman v. Parsons, 789 F.2d 1532 (11th Cir. 1986) (Trustees of pension fund in possession of taxpayers's property which is subject to tax levy are exempt from liability to said taxpayer for surrendering the property to the IRS).

Summary judgment is appropriate if the pleadings and discovery material, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c); Mason v. Shalala, 994 F.2d 1058 (3d Cir. 1993). Here, there is no genuine issue as to any material fact, and the defendant Pension Fund is entitled to judgment as a matter of law.

Therefore, for the reasons set forth above, it is recommended that the plaintiff's motion for summary judgment (Docket No. 6) be denied, that the

defendant's cross-motion for summary judgment (Docket No. 17) be granted, and that the plaintiff's motions for temporary restraining order (Docket No. 15) and preliminary injunction (Docket No. 16) be denied as moot.[13]

Within ten (10) days after being served with a copy, any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

Respectfully submitted,

"s/ Robert C. Mitchell"

ROBERT C. MITCHELL, Chief
United States Magistrate Judge

Dated: November 22, 1993

FOOTNOTES

1. In light of our instant recommendation as to the parties' cross-motions for summary judgment, the plaintiff's motions for temporary restraining order and preliminary injunction are moot.

2. See, Affidavit of Marie C. Olmsted at ¶ 4.

3. Id.

4. Id. at ¶ 6.

5. Id. at ¶ 9.

6. Id.

7. See, Huber Affidavit at ¶ 4.

8. Id.

9. See, Exhibit MO-4, which is attached to the Olmsted Affidavit.

10. See, Huber Affidavit at ¶¶ 5-6.

11. Id. at ¶ 5.

12. Although the plaintiff argues otherwise, ERISA qualified plans are not exempt from levy. See, Carman v. Parsons, 789 F.2d 1532 (11th Cir. 1986); In re Jacobs v. IRS, 147 B.R. 106 (W.D.Pa. 1992).

13. Although the Pension Fund seeks attorney fees and costs for the "frivolous and meritless nature of the plaintiff's

legal arguments", we decline to award such fees. It is within the Court's discretion to award attorney's fees under 29 U.S.C. § 1132(g)(1), and in making our determination, we have considered the following policy factors: (1) the offending party's culpability or bad faith; (2) the ability of the offending party to satisfy an award of attorney's fees; (3) the deterrent effect of an award of attorney's fees against the offending party; (4) the benefit conferred on members of the pension plan; and (5) the relative merits of the party's position. See, Gray v. Dow Chemical Co., 615 F.Supp. 1040, 1045 (W.D.Pa. 1985), aff'd., 791 F.2d 917 (3d Cir. 1986). No one of these factors is determinative, and not all of said factors must be considered. Trucking Emp. of N. Jersey Welfare F. v. Brockway, 130 F.R.D. 314, 325 (D.N.J. 1989). Here, since the plaintiff has neither exhibited bad faith in these proceedings, nor appears able to satisfy an award of attorney's fees in light of the IRS levy on his monthly pension benefit, we find it inappropriate to award such fees.